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Supreme Court, U.S.
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In the
Supreme Court of the United States

KENTUCKY RETIREMENT SYSTEMS, COMMONWEALTH OF KENTUCKY and JEFFERSON COUNTY SHERIFF'S OFFICE
Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

The following question was presented in the Petition for Writ of Certiorari:

> Is the determination of the eligibility for, and calculation of, State retirement benefits an attribute of State Sovereignty which is constitutionally protected from federal intrusion?

In accordance with Supreme Court Rule 14(1)(a), this is the only question to be considered by the Court. The Rules do not allow a respondent to present additional questions to the Court. See Supreme Court Rule 15. Nonetheless, Respondent has attempted to do so herein. Petitioners object to such efforts and request the Court to confine its review to the question presented in the Petition for Writ of Certiorari.

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Kentucky Retirement Systems, the Commonwealth of Kentucky, and the Jefferson County Sheriff's Office (collectively referred to as "Kentucky Retirement") have petitioned for a Writ of Certiorari to review the August 2, 2001 Opinion of the United States Court of Appeals for the Sixth Circuit which affirmed in part, reversed in part the May 4, 2000 Memorandum Opinion and Order and the September 25, 2000 Order entered by the United States District Court for the Western District of Kentucky. Kentucky Retirement seeks review of that portion of the Opinion which affirmed in part the judgment below. It files this Reply in response to the implicit challenge raised by the Equal Employment Opportunity Commission ("EEOC") to the remaining portion of the Opinion which reversed in part the judgment below and in response to the EEOC's contention that there are no compelling reasons to grant the Petition.

ARGUMENT

I. THE EEOC'S FAILURE TO FILE A CROSS-PETITION PRECLUDES IT FROM ASSERTING A CHALLENGE TO THE 6th CIRCUIT'S OPINION

The EEOC improperly seeks to raise a challenge to that portion of the Sixth Circuit Opinion whereby the Court exercised jurisdiction over the Tenth Amendment claims asserted by Kentucky Retirement and reversed in part the judgment below. It argues:

> The court of appeals lacked jurisdiction to review the denial of petitioners' motion to dismiss on Tenth Amendment grounds because that interlocutory ruling is neither within the 'small class' of decisions subject to immediate

> appeal under the 'collateral order' doctrine, nor within the scope of any authority the court had to exercise 'pendent appellate jurisdiction.' That provides an independent reason to deny the petition.

(Opposition Brief, p. 18) (citations omitted).

The EEOC's failure to file a Cross-Petition for a Writ of Certiorari precludes it from raising this challenge.

This Court has long required that a respondent file a Cross-Petition for a Writ of Certiorari as a prerequisite to seeking a reversal of the judgment below. See United States v. Reliable Transfer Co., 421 U.S. 397, 44 L. Ed. 2d 251, 95 S. Ct. 1708, 1711, n. 2 (1975) ("However, absent a cross-petition for certiorari, the respondent may not now challenge the judgment of the Court of Appeals to enlarge its rights thereunder."); National Labor Relations Board v. Express Pub. Co., 312 U.S. 426, 85 L. Ed. 930, 61 S. Ct. 693, 697 (1941) ("But in the absence of a cross-petition for certiorari by respondent that question is not open here.").

The EEOC can not circumvent this procedural step by arguing that it is merely providing "an independent reason to deny the petition". (Opposition Brief, p. 18). If that "independent reason" could serve to reduce the petitioner's rights obtained in the judgment below, it must be supported by a Cross-Petition for a Writ of Certiorari.

> Without cross-petitioning for certiorari, a prevailing party may, of course, 'defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District

> Court or the Court of Appeals', provided that an affirmance on the alternative ground would neither expand nor contract the rights of either party established by the judgment below.

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 106 L. Ed. 2d 26, 109 S. Ct. 2782, 2788 (1989) (emphasis added) (citation omitted).

> A prevailing party need not cross-petition to defend a judgment on any ground properly raised below, so long as that party seeks to preserve, and not to change, the judgment. A cross-petition is required, however, when the respondent seeks to alter the judgment below.

Northwest Airlines, Inc. v. County of Kent, Michigan, 510 U.S. 355, 127 L. Ed. 2d 183, 114 S. Ct. 855, 862 (1994). (emphasis added) (citation omitted).

As the EEOC concedes, it attempted to persuade the Sixth Circuit that it had no jurisdiction to hear the Tenth Amendment claims. Consistent with its prior precedent,[1] the Sixth Circuit rejected the EEOC's argument and exercised jurisdiction over both the Tenth and Eleventh Amendment claims. The court found merit in Kentucky Retirement's contention that the Tenth Amendment precludes the EEOC from directing the Commonwealth to enact permanent legislation. It accordingly reversed the "the district court's denial of immunity with regard to section D of the EEOC's prayer for relief" and held that "Defendants are entitled to

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[1] See Michigan Bell Tel. Co. v. Climax Tel. Co., 202 F. 3d 862 (6th Cir.), cert. denied, 531 U.S. 816 (2000).

Tenth Amendment immunity from a mandate that it 'enact permanent legislation.''' (Appendix A, p. 21a). If the unpreserved jurisdictional challenge proposed by the EEOC is accepted,[2] this ruling would necessarily be set aside. In accordance with Supreme Court Rules 14(1)(a) and 15 and this Court's prior precedent, the EEOC's argument should therefore not be heard.

In a similar situation, this Court in Northwest Airlines, Inc. v. County of Kent, Michigan, 114 S. Ct. 855, 862 (1994) refused to address a jurisdictional challenge which, if accepted, would have affected the entire judgment, reasoning:

> Alteration would be in order if the private right of action question were resolved in favor of the Airport. For then, the entire judgment would be undone, including the portion remanding for reallocation of CFR costs between the Airlines and general aviation. The Airport's failure to file a cross-petition on the CFR issue—the issue on which it was a judgment *loser*— thus leads us to resist the plea to declare the AHTA claim unfit for District Court adjudication.

Northwest Airlines, Inc. v. County of Kent Michigan, 114 S. Ct. 855, 862 (1994) (emphasis in original).

So too herein, acceptance of the EEOC's "independent reason" would necessarily reduce Kentucky Retirement's rights established under the judgment below.

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[2] Kentucky Retirement believes in fact that the challenge would be rejected. See Michigan Bell Tel. Co. v. Climax Tel. Co., 202 F. 3d 862 (6th Cir.), cert. denied, 513 U.S. 816 (2000).

Accordingly, in order to be properly preserved, the EEOC's argument must be supported by a Cross-Petition for a Writ of Certiorari. National Labor Relations Board v. Express Pub. Co., 61 S. Ct. 693, 697 (1941). Because it is not, the Court should refuse to consider it. Granfinanciera, S.A. v. Nordberg, 109 S. Ct. 2782, 2788 (1989).

II. THE PETITION SEEKS A CLARIFICATION OF THE BOUNDARIES OF FEDERALISM IN THE CONTEXT OF A STATE RETIREMENT PLAN CREATED AND CONTROLLED BY A STATE LEGISLATURE

The EEOC additionally attempts to side track the Court by mischaracterizing Kentucky Retirement's argument on the merits. Kentucky Retirement does not contend that: "state employers are uniquely immune from federal regulation pursuant to the ADEA." (Opposition Brief, p. 8). To the contrary, Kentucky Retirement's Tenth Amendment challenge to the application of the ADEA to the State retirement plan is fact specific, posed in the limited context of a state-operated pension plan similar to many existing across the United States.

At issue is a retirement plan created by the Kentucky General Assembly years before the enactment of the ADEA. Under state law, Kentucky Retirement thereby entered into an inviolable contract with the members of the State retirement plan. See Section 19, Constitution of Kentucky; KRS 16.652; KRS 61.692 and KRS 78.852. Kentucky Retirement can not, as suggested by the EEOC, simply choose to do away with the retirement plan if it is unable to comply with the EEOC's construction of the ADEA. Unlike a private employer, it is

instead bound by the inviolable contract created through the existing statutes.

To further compound the dilemma, Kentucky Retirement can take no steps to comply with the EEOC's demands without a revision to the state statutory scheme. The terms of the State retirement plan, including those specifically challenged by the EEOC, are contained in the Kentucky Revised Statutes. Any revisions to those terms must come from the General Assembly through the enactment of additional legislation.

Indeed, the entire focus of this litigation is, and has from the outset been, on the EEOC's contention that it is entitled to demand a revision of the State statutory scheme. The EEOC alleged in its Complaint that that portion of the Kentucky Revised Statutes wherein the General Assembly defined the eligibility requirements under the retirement plan was violative of the ADEA. The EEOC's demand for injunctive relief and monetary damages was premised upon the contention that Kentucky Retirement's past compliance with the Kentucky Revised Statutes was a corresponding unlawful employment practice under the ADEA. The EEOC recognized that the only way to remedy this alleged violation was to obtain an order from the court compelling the General Assembly to revise the Kentucky statutory scheme.[3]

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[3] The EEOC's claim before this Court that one can not yet determine what steps would be necessary to enforce a judgment against Kentucky Retirement if the EEOC should prevail on the merits is contradicted by its own pleadings. It requires no speculation to determine that there must be a revision to the state statutory scheme in order to satisfy the EEOC's demands.

In light of this background, Kentucky Retirement's Petition queries, if, as the Sixth Circuit Court of Appeals held, the Tenth Amendment prohibits the EEOC from compelling the General Assembly to enact "permanent legislation", why does it not just as equally prohibit the EEOC from demanding injunctive relief and monetary damages which can not be satisfied without the enactment of the same compelled legislation. The logical conclusion to be drawn is that either way, the EEOC is seeking to commandeer the Kentucky General Assembly. The Tenth Amendment does not allow it to do so. New York v. United States, 505 U.S. 144, 120 L. Ed. 2d 120, 112 S. Ct. 2408, 2420 (1992).

The EEOC chastises Kentucky Retirement for relying on this Court's most recent Tenth Amendment precedent, arguing that this question must be judged against National League of Cities v. Usery, 426 U.S. 823, 49 L. Ed. 2d 245, 96 S. Ct. 2465 (1976); Equal Employment Opportunity Commission v. Wyoming, 460 U.S. 226, 75 L. Ed. 2d 18, 103 S. Ct. 1054 (1983) and Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985). The EEOC places particular significance on the absence of a discussion of Garcia in the Petition. Garcia, however, is not the last word in this Court's analysis of the Tenth Amendment restraints over the relationship between the federal government and the States. To the contrary, there has been a continuing evolution of the Tenth Amendment precedent since Garcia. For that reason, Kentucky Retirement relied on this Court's most recent analysis of the balance between state and federal powers as presented in New York v. United States, 112 S. Ct. 2408 (1992); United States v. Lopez, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995) and Printz v. United States, 521 U.S. 898, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997). Under the current standard recognized in these decisions "if a power

is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power that the Constitution has not conferred on Congress." New York v. United States, 112 S. Ct. 2408, 2417 (1992) (citation omitted). Kentucky Retirement maintains that the determination of the eligibility for, and calculation of, State retirement benefits is such an attribute of States Sovereignty which is not subject to federal intrusion.

The EEOC counters that these more recent decisions are distinguishable and can not be read to extend to this particular fact pattern. Kentucky Retirement disagrees. In any event, Kentucky Retirement does not believe that this Court has completed its assessment of the boundaries of Federalism as defined in the Tenth Amendment. In his dissent in Garcia v. San Antonio Metropolitan Transit Authority, 105 S. Ct. 1005, 1033 (1985), Justice Rehnquist expressed the belief that the principles of Federalism recognized in the pre-Garcia precedent would in time "again command the support of the majority of this Court." Justice O'Connor likewise indicated that she shared in this belief. Garcia v. San Antonio Metropolitan Transit Authority, 105 S. Ct. at 1037. Kentucky Retirement respectfully urges the Court that the time has now arrived to address this issue anew and set forth a more definitive standard.

The facts presented in this appeal are particularly ripe for a renewed endorsement of Federalism. Kentucky Retirement has an inviolable contract with its eligible employees guaranteeing a program of retirement benefits where once one is eligible for an unreduced retirement benefit, whether by years of service, age, or a combination of attained age and years of service, the employee no longer is eligible for a disability retirement. The EEOC dismisses the significance of such a contract, arguing that if the General

Assembly fails to enact new legislation revising such contract, Kentucky Retirement should simply ignore the State statutory scheme in order to bring it in compliance with the EEOC's construction of the ADEA. Such result compelled by the judiciary is just as much a commandeering of the Kentucky General Assembly as an order of the court directing that specific legislation dictated by the EEOC be enacted. Either way, the legislative will of the Commonwealth will be subverted in an area in which the federal government has no legitimate interest.

Under such circumstances, Kentucky Retirement urges the Court to grant the Petition and address this question which impacts state-operated pension plans across the United States.

CONCLUSION

For these reasons, along as those set forth in the Petition for Writ of Certiorari, Kentucky Retirement Systems, Commonwealth of Kentucky and Jefferson County Sheriff's Office urge the Court to grant the Petition for Writ of Certiorari and address the issue of whether the determination of the eligibility for, and calculation of, State retirement benefits is an attribute of State Sovereignty reserved to the States by the Tenth Amendment.

Respectfully submitted on this the 12th day of December, 2001.

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